STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 14, 2006
v	No. 257850 Oakland Circuit Court
ERIC D. GALLOWAY, Defendant-Appellant.	LC No. 2004-194051-FC

Before: Cavanagh, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions of second-degree murder, MCL 750.317, first-degree fleeing or eluding a police officer, MCL 257.602a(5), operating a vehicle while license suspended causing death, MCL 257.904(4), failure to stop at the scene of an accident causing death, MCL 257.617(3), two counts of second-degree fleeing or alluding resulting in serious injury, MCL 275.602a(4)(a), two counts of operating a vehicle while license suspended causing serious impairment, MCL 257.904(5), receiving or concealing a stolen motor vehicle, MCL 750.535(7), and possession of marijuana, MCL 333.7403(2)(D). We affirm.

On December 1, 2003, shortly after 1:00 a.m., Sergeant Jonathan Schultz of the Beverly Hills Police Department observed a maroon minivan with one nonoperational taillight. Sergeant Schultz activated his overhead lights to stop the vehicle. Defendant, the driver of the minivan, pulled over on Walmer Street and stopped. Before Sergeant Schultz could exit his police car, however, defendant fled in the minivan. At that point, Sergeant Schultz turned on his siren, followed the minivan, and obtained its license plate number, which he relayed to his dispatcher. Sergeant Schultz continued to follow the minivan, and observed it run a stop sign, run over a curb, turn into and travel in oncoming traffic lanes, and proceed through three blinking yellow lights. Sergeant Schultz obtained a radar speed of 45 to 50 miles an hour for the minivan on Southfield Road, where the speed limit was 25 miles an hour. Thereafter, the minivan continued to accelerate up to a speed of 91 miles an hour. It ultimately ran a red light at that speed at the intersection of Southfield Road and Twelve Mile Road. As the minivan ran the red light, it struck a Ford Taurus, which was traveling eastbound through the intersection. Defendant never slowed before impact. Sergeant Schultz anticipated that defendant planned to run the red light and, before the crash, he notified his dispatcher that he was backing off from the chase. He

slowed down before the accident occurred. Immediately after the crash, defendant exited the driver's side of the minivan and ran away. During the chase, Sergeant Schultz had been informed that the minivan was stolen.[1]

The Taurus's back seat passenger, Haimut Amsula, was ejected from the vehicle on impact and died of severe head injuries. Senait Testye, the front seat passenger in the Taurus, broke her back. At the time of trial, she testified that she continues to suffer pain every time she stands and that she has never returned to work. Lulah Tabit, the driver of the Taurus, suffered fractures of her pelvis, hip, rib, and vertebrae.

Defendant was captured two blocks from Twelve Mile Road by Southfield police officers. When he was first spotted by the police, he ran from them. At the time of his arrest, he possessed two baggies of marijuana. The evidence revealed that defendant had never obtained a driver's license. However, he had been ticketed in the past for driving violations and had two suspensions on his driving record. Defendant had marijuana metabolites in his blood six hours after the accident.

On December 1, 2003, defendant was interviewed by Michigan State Police Trooper Adam Henderson. Defendant initially claimed that he was not the driver of the minivan, but was just a passenger. Later, he admitted that he was driving and that he ran away after the crash to get away from the police. He knew he had a warrant out for his arrest. Defendant indicated that he had paid money to a "dope guy" to borrow the minivan.

At trial, defendant testified that he rented the van from a "dope man" on December 1, 2003, and was on his way to visit some girls before an officer attempted to stop him. Defendant had "an idea" that the vehicle he was driving was stolen. He initially pulled over for the officer, but then decided to run. He had an outstanding warrant and did not want to go to jail. He knew the officer was behind him, following him, and trying to stop him, but he did not pull over because he did not want to go to jail. Defendant, who never attended driver's training and did not possess a driver's license, was aware that other traffic was on the road. He knew his driving experience was limited. During the chase, however, he never looked at the speedometer. He was too busy trying to get away. When defendant approached the intersection of Southfield Road and Twelve Mile Road, he saw a car stopped in the intersection in front of him. There were one or two other cars in the area, but he did not see any cars in the intersection. He knew the traffic light was red, but thought it would turn green by the time he got to it. He increased his speed and moved around the stopped car. He testified that he increased his speed to try to get away. He admitted that he saw the Taurus before the crash but, by then, it was "too late." He never slowed down before the accident, and he admitted that he knew he was speeding. Defendant also admitted that he had marijuana in his possession and that he jumped from the minivan and ran from the police after the crash. Defendant claimed that he did not anticipate that someone would get killed. He admitted, however, that he smoked a lot of marijuana the day

[1] The minivan was stolen on November 15, 2003. When it was recovered, the ignition was punched.

before the accident and smoked his last "blunt" at approximately 5:00 p.m. on November 30, 2003. He was still "buzzing" at the time of the accident.

Defendant first argues that there was insufficient evidence to support his second-degree murder conviction because the evidence failed to establish the required mental state of wanton and willful disregard or malicious intent beyond a reasonable doubt. When reviewing the sufficiency of the evidence in a criminal case, we "view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt." *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997) (citations omitted). This standard applies to bench trials. *People v Harmon*, 248 Mich App 522, 524; 640 NW2d 314 (2001); *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). All evidentiary conflicts must be resolved in favor of the prosecution. *Harmon, supra*; *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

> The elements of second-degree murder are "'(1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse.'" Malice is defined as the "intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm." Malice may be inferred from evidence that the defendant "intentionally set in motion a force likely to cause death or great bodily harm." The prosecution is not required to prove that the defendant actually intended to harm or kill. Instead, the prosecution must prove "'the intent to do an act that is in obvious disregard of life-endangering consequences.'" [*People v Werner*, 254 Mich App 528, 531; 659 NW2d 688 (2002) (citations omitted).]

In *People v Goecke*, 457 Mich 442, 466-469; 579 NW2d 868 (1998), the Court discussed the mental state necessary to sustain a conviction of second-degree murder.

> Another way to conceptualize this mental state is to recognize that because malice is implied when the circumstances attending the killing demonstrate an abandoned and malignant heart, "[t]his simply means that malice may be implied when the defendant does an act with a high probability that it will result in death and does it with a base antisocial motive and with wanton disregard for human life." The formulation is an appropriate reflection of our understanding that malice requires egregious circumstances, and we expressly approve it. [*Id*. at 467 (citations omitted).]

Cases supporting a conviction of second-degree murder involve a level of conduct beyond that of simply driving while intoxicated. *Id*. at 469.

In this case, defendant was "buzzing" from large amounts of marijuana that he consumed the previous day. He was in a stolen vehicle, possessed marijuana, and had a warrant out for his arrest. He had no driver's training, no driver's license, and had two suspensions on his driving record. His driving experience was limited. Yet, he consciously chose to run from the police after initially stopping for an officer. He accelerated the minivan, ran through a stop sign, ran over a curb, crossed into and traveled in oncoming traffic lanes, proceeded through three blinking yellow lights without slowing down, knew he was approaching an intersection where

the light was red, knew there was other traffic around the intersection, and accelerated through the red light at 91 miles an hour, striking the Taurus. His testimony made clear that he was aware of what was occurring, including that he was being followed by the police, who wanted to stop him, and that he was approaching a red light. Nevertheless, he continued to "pat" the accelerator. He was determined to get away from the police because he did not want to go to jail. After he hit the Taurus, he continued his quest to elude the police by fleeing on foot. Defendant's acts of fleeing at high rates of speed while "buzzing" from marijuana, having no driver's training, and disregarding traffic signals and the safety of other vehicles supports an inference that he acted with a high probability that his acts would result in death and that he acted with wanton disregard for human life. Moreover, defendant made clear that he had no intention of getting caught by the police because he did not want to go to jail. Thus, he had a base antisocial motive for his conduct. Defendant intentionally set in motion a force likely to cause death or great bodily harm. See *Werner, supra*. On this record, the element of malice was proven beyond a reasonable doubt.

Defendant next argues that the trial court erred when it failed to suppress his custodial statements. Defendant argues that, at the *Walker*[2] hearing, the prosecutor failed to prove that he was advised of all of his rights and thus, he could not have knowingly and intelligently waived those rights. Although our review is de novo on the entire record, we will not disturb the trial court's factual findings regarding a knowing and intelligent waiver. *People v Cheatham*, 453 Mich 1, 30; 551 NW2d 355 (1996). We give deference to the trial court's findings at a suppression hearing. *Id*. at 29.

At the *Walker* hearing, Trooper Henderson testified that he met with defendant at 10:00 a.m. on December 1, 2003. Defendant was in custody, and their conversation was recorded. While Henderson could not recite verbatim the rights he read to defendant, he specifically testified that defendant's *Miranda*[3] rights were individually read verbatim from a police-issued warning card.[4] Defendant was thereafter asked if he understood each right and was asked to restate what each right meant to him. Trooper Henderson testified that defendant correctly explained each right. Defendant was then asked if he would waive his rights and answer questions. He agreed. Defendant later prepared a written statement. The document on which he wrote contained a recitation of his *Miranda* rights and he signed the document, although each individual right was not separately initialed by him. Trooper Henderson testified that the written warnings on the document were the same warnings that he previously read to defendant. At the *Walker* hearing, the prosecutor attempted to play a tape of the interview for the trial court. The trial court could not understand the tape and requested a transcript. The transcript was not

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[2] *People v Walker (On Rehearing)*, 374 Mich 331, 338; 132 NW2d 87 (1965).

[3] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[4] Defendant misrepresents the record on appeal when he asserts that Trooper Henderson only informed him of some of his rights. When asked by the prosecutor to recite the rights he gave to defendant, Trooper Henderson indicated that he could not recall them verbatim. He tried to recite them from memory but did not manage to do so completely. However, Trooper Henderson made clear that he read defendant each and every right from the police-issued warning card.

prepared before the trial court ruled. However, it was later prepared and read into the record at trial. It supported Trooper Henderson's testimony that defendant was informed of every right, understood every right, and fully waived his rights.

At the *Walker* hearing, defendant admitted that Trooper Henderson explained something to him, which he believed to be his rights. He claimed, however, that he did not understand what he was told. He also claimed that he did not read the rights information on his written statement. Defendant further claimed that he only possessed a fifth-grade education. He later admitted, however, that he can read and write. Moreover, he admitted that he submitted his motion to suppress in propria persona. While he claimed that someone else drafted the motion, he admitted that he used the same word "leniency" in both his written statement to the police and his motion to suppress. Moreover, he used the word "lenient" without prompting while testifying at the *Walker* hearing. This demonstrated a level of sophistication in defendant's vocabulary and cast doubt on his claim that he did not draft his own motion and did not have a sufficient education to understand his rights.

The trial court found that Trooper Henderson's testimony was credible. It found that Trooper Henderson had advised defendant of his *Miranda* rights extensively and questioned him about the meaning of those rights before asking defendant if he was willing to waive his rights. Further, the trial court concluded that the prosecution sustained its burden of proving that defendant's statements were knowing and voluntary. On this record, and giving deference to the trial court's factual finding regarding Trooper Henderson's credibility, we affirm the trial court's decision. Trooper Henderson was unequivocal in his testimony that he read verbatim each and every right to defendant and discussed those rights with him before the waiver. We therefore reject defendant's claim that he was not fully advised of all of his rights and thus, could not have waived them. Because he was advised of all of his rights, the trial court did not err in finding a knowing and intelligent waiver of those rights.

Finally, defendant challenges his sentence for second-degree murder, arguing that offense variable (OV) 3, MCL 777.33, was improperly scored. He argues that no points may be scored for OV 3 where the sentencing offense for which the guidelines are scored is a homicide. This issue is preserved because it was raised at sentencing. MCL 769.34(10). Issues of statutory construction are reviewed de novo. *People v Albers*, 258 Mich App 578, 591-592; 672 NW2d 336 (2003).

MCL 777.33 provides, in relevant part:

> (1) Offense variable 3 is physical injury to a victim. Score offense variable 3 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points . . .

One hundred points should be scored if the victim was killed, MCL 777.33(1)(a), unless the sentencing offense is a homicide, MCL 777.33(2)(b). Twenty-five points should be scored if a victim suffers a life threatening or permanent incapacitating injury. MCL 777.33(1)(c).

In this case, the trial court scored OV 3 at 25 points based on the injuries to the two victims, who were not killed. In *Albers*, *supra* at 592-593, this Court determined that the term "victim" as used in OV 3 does not reference only the victim of the sentencing offense, but

"includes any person harmed by the criminal actions of the charged party." *Id*. Thus, the injuries to the other two victims were properly considered by the trial court in scoring OV 3. *Id*. Accordingly, we affirm the scoring of OV 3 at 25 points based on the serious, permanent incapacitating injuries to the victim, Testye.

Although defendant argues that *Albers* was improperly decided and should be overruled on grounds of statutory construction, we are bound by that decision. MCR 7.215(J)(1). Moreover, we find it unnecessary to revisit that decision in this case because a score of 25 points for OV 3 may be upheld on alternative grounds. Recently, in *People v Houston*, 473 Mich 399, 405-408; 702 NW2d 530 (2005), the Court considered the scoring of OV 3 in a situation where the only victim was shot and killed. In *Houston*, *supra* at 406, the Court held that zero points may be assessed under OV 3 "only when '[n]o physical injury occurred to the victim.'" Where physical injury occurs and the sentencing offense is a homicide, a score of 10 or 25 points is appropriate. *Id*. Because the victim in *Houston* suffered a gunshot wound to the head, 25 points was properly scored even though the sentencing offense was a homicide. *Id*. at 407. Under *Houston*, a score of 25 points for OV 3 was appropriate in this case based on the fatal, catastrophic head injuries suffered by Haimut Amsula in the crash. A score of zero points for OV 3 was not an appropriate option for the trial court. *Id*. at 406. Because OV 3 was properly scored, regardless of the reason for the scoring, resentencing is not warranted. See *People v Lucas*, 188 Mich App 554, 577; 470 NW2d 460 (1991).

Affirmed.

/s/ Mark J. Cavanagh
/s/ Joel P. Hoekstra
/s/ Jane E. Markey